In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-227

PACIFIC FM, INC., d/b/a RADIO STATION K-101,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The Petitioner Pacific FM, Inc., d/b/a Radio Station K-101, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in enforcement of an order of the National Labor Relations Board on May 17, 1976.

OPINIONS BELOW

The decision and order of the National Labor Relations Board is reported at 215 NLRB No. 116 (1974)

and attached hereto as Appendix A, *infra,* pp. 1-64. The memorandum opinion rendered by the United States Court of Appeals for the Ninth Circuit in enforcement of the order of the National Labor Relations Board, appended as Appendix B, *infra,* pp. 65-68, is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 17, 1976. A timely petition for rehearing and suggestion for rehearing in banc was denied on July 20, 1976. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals contravened established principles of law, enunciated in decisions of this Court, in its initial determination that a News Director employed by Petitioner was not a manager within the meaning of the Labor-Management Relations Act despite the fact that the issue of managerial status, a question relegated solely to the discretionary authority of an administrative agency, had not been decided nor even addressed by the National Labor Relations Board.

2. Whether the Court of Appeals disregarded applicable decisions of this Court in its refusal to require that the National Labor Relations Board both resolve the determinative issue of an employee's man-

agerial status and state an articulated basis for that resolution when the issue had been presented to the National Labor Relations Board for decision.

3. Whether the action of the Court of Appeals in substituting its discretion for that of the agency charged with determining issues of managerial status so undermined the administrative process as to greatly increase reliance on and utilization of the federal court system for resolution of issues properly subsumed within the authority of the administrative agency itself; and

4. Whether it is necessary for this Court to exercise its supervisory powers to prohibit utilization of the federal appellate court as a forum for administrative decision-making in order to limit needless litigation before the courts of appeals and the consequent undue burden placed on the federal court system.

STATUTES INVOLVED

The main statutory provision here involved is Section 10(e) of the Labor-Management Relations Act in 1947, as amended (29 U.S.C. §160(e)), in that Section 10(e) governs judicial review of decisions of the National Labor Relations Board upon petition of that agency to the Courts of Appeals for enforcement of its orders.

Additionally involved in this case, although not directly relevant to the issues before this Court, are Sections 2(3), 8(a)(1) and 8(a)(3) of the Labor-

Management Relations Act of 1947, as amended (29 U.S.C. §§152(3), 158(a)(1) and 158(a)(3). As the above-cited statutory provisions are lengthy, they have been set forth as Appendix C, *infra,* pp. 69-72.

STATEMENT OF THE CASE

This case arose by petition of the National Labor Relations Board (hereinafter referred to as the "NLRB") for enforcement of its order (Appendix A, *infra,* pp. 1-64) issued against Petitioner Pacific FM, Inc., d/b/a Radio Station K-101, in December, 1974. Enforcement was sought before the United States Court of Appeals for the Ninth Circuit in accordance with Section 10(e) of the Labor-Management Relations Act (hereinafter referred to as the "Act"); the petition of the NLRB was properly within the jurisdiction of the Court of Appeals in accordance with Section 10(e).

It is not here necessary to detail the findings or proceedings of the National Labor Relations Board. It is sufficient to state that the Administrative Law Judge with subsequent NLRB affirmance found that Petitioner, the operator of a radio station in the San Francisco Bay Area, had committed certain unfair labor practices within the meaning of Sections 8(a)(1) and 8(a)(3) of the Act.

Only one finding is relevant hereto; namely, the conclusion of the Administrative Law Judge, sustained by the NLRB, that Mark T. Provost, Petitioner's News Director, had been discharged on

October 1, 1973, in violation of Section 8(a)(3) of the Act.[1]

Evidence was adduced at the hearing held before the Administrative Law Judge in February of 1974, regarding Provost's supervisory status as it was Petitioner's contention that Provost was not an employee within the meaning of Section 2(3) of the Act and hence not entitled to the Act's protection. Petitioner's argument on the supervisory status of Provost was rejected by both the Administrative Law Judge and the National Labor Relations Board with subsequent affirmance by the Court of Appeals. Such rejection is not contested here.

Immediately prior to the issuance of the decision of the Administrative Law Judge rendered herein on June 12, 1974, this Court issued its decision in *National Labor Relations Board v. Bell Aerospace Company, Division of Textron, Inc.,* 416 U.S. 267 (1974). Based on that decision, and in particular on this Court's holding that managerial personnel were to be excluded from the Act's protection in all circumstances, Petitioner argued to the National Labor Re-

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[1]It should be emphasized that the issue of Mark T. Provost's discharge is not raised for purposes of contesting those findings actually made by the NLRB relative to the discharge. Rather, the factual circumstances are related for the purpose of providing background information necessary to an understanding of the sole issue presented by way of this petition for certiorari; namely, the NLRB's failure to decide whether or not Mark Provost was a manager and the subsequent action of the Court of Appeals in initially making that determination. Thus, while a brief factual description of the proceedings is necessary, the issue discussed in this petition is one of administrative processes and the scope of judicial review of those processes rather than any assertion that the NLRB incorrectly decided the issues which were, in fact, addressed by that body.

lations Board, in its exceptions to the decision of the Administrative Law Judge, that Provost was a managerial employee and hence was not entitled to the Act's protections for discriminatory discharge. In so arguing, Petitioner relied upon the extensive evidence produced in the 822 pages of testimony before the Administrative Law Judge regarding Provost's job duties and responsibilities. Petitioner argued to the NLRB in its exceptions and supporting brief that the testimonial record taken in conjunction with the decision of this Court in *NLRB v. Bell Aerospace Co., supra,* mandated consideration of Provost's managerial status.

The National Labor Relations Board issued its decision in affirmance of the Administrative Law Judge's findings and conclusions on June 12, 1974. In rendering the three-page cursory decision attached hereto as Appendix A, *infra,* pp. 1-3, the National Labor Relations Board completely ignored the issue raised by Petitioner with regard to Provost's managerial status; an issue critical to the validity of the NLRB's decision that Provost had been discriminatorily discharged. Not only did the NLRB not decide the issue of managerial authority, no reason was provided as to why the question of Provost's managerial authority was not even considered. Furthermore, the NLRB failed to even mention the fact that this determinative issue had been raised, much less provide an explanation as to why the issue was neither addressed nor decided.

In proceedings before the United States Court of Appeals for the Ninth Circuit pursuant to Section 10

(e) of the Act, Petitioner vigorously argued that the NLRB's refusal to address a determinative issue properly before it rendered the order invalid and, at a minimum, this issue should be remanded to the NLRB for determination. In enforcing the NLRB's order by memorandum opinion dated May 17, 1976, the Court of Appeals rejected Petitioner's position that the administrative agency charged with determining questions relating to employee status could not abrogate its delegated function by refusing to address such issue. Instead, the Court of Appeals, in the absence of any finding by the NLRB, decided that Provost was not a managerial employee. The Court of Appeals thus upheld the NLRB's decision on the basis of a rationale first supplied by the court itself; a finding made by the court in the first instance upon its independent review of the record before the administrative body.

The Court of Appeals concluded that a remand of the case to the NLRB for a determination of Provost's managerial status was not necessary for two reasons. First, the Court assumed, without any discernible basis in the record for such assumption, that the NLRB had examined and rejected the contention that Provost was a managerial employee (Memorandum Opinion; Appendix B, infra, p. 69).[2] Second, the Court determined upon independent examination of

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[2]Not only is the issue of managerial status not mentioned in either the NLRB decision or the Administrative Law Judge's opinion, the only factual finding made by either the NLRB or Administrative Law Judge was to the effect that Provost was not a supervisor (Decision of the Administrative Law Judge; Appendix A, *infra,* p. 51).

the record that Provost was not a managerial employee and hence that the NLRB's failure to address the issue and state a conclusion thereon was not determinative.

In a Petition for Rehearing filed on June 1, 1976, reconsideration of the court's decision was urged by Petitioner on the sole basis that the court had seriously undermined the administrative process by both usurping authority relegated to the administrative agency and by refusing to require articulation of administrative reasoning. The Petition for Rehearing was denied on July 20, 1976.

This case presents important and recurring questions regarding the validity of the administrative process, the proper role of a federal appellate court in insuring that the administrative process retains its primacy in decision-making and the efficient workings of the federal court system. If a court of appeals may, with impunity, initially act upon matters within the sole authority of an administrative agency, both the agency's viability and the federal judiciary's efficient functioning are at stake. Also, litigants are encouraged to increase their use of the federal court system and the NLRB is reassured that the court system will make substantive decisions on issues the NLRB avoids or does not address.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. IN DETERMINING IN THE FIRST INSTANCE A QUESTION RELEGATED TO THE SPHERE OF ADMINISTRATIVE AUTHORITY, THE COURT OF APPEALS DECIDED A FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals, in evaluating the administrative evidentiary record for the purpose of making an initial finding on Provost's managerial status, ignored a long line of decisions rendered by this Court prohibiting substitution of judicial discretion for that of the agency delegated the task of deciding matters within its statutory mandate and specialized expertise. In so doing, the Court of Appeals overstepped the boundary lines between agency decision-making and judicial review thereof which have been so painstakingly demarcated by this Court.

Prior to examining relevant precedent, it is important to delineate exactly what was done by the Court of Appeals in this case. In reaching the conclusion that Provost was not a managerial employee, the court undertook an independent review of the administrative record. In this review, the court both weighed evidence and drew inferences from that evidence in order to reach a legal conclusion. That the court did indeed engage in this process is apparent on the face of its memorandum opinion. The court therein admitted that no NLRB finding was made on the issue of managerial status in its statement that a "failure to contrast an employee with a manager" occurred (memorandum opinion; Appendix B, *infra*, p. 67). The court then attempted to dispel the impact of its

assumption of the task of contrasting employee and managerial status in the first instance by stating that the record contained ample indicias of Provost's employee status. In this analysis, the Court ignored the glaring fact that the NLRB made only one finding; that Provost was a non-supervisory employee. No finding, discussion, or indication of any considerations whatsoever appears in the NLRB's decision with regard to the issue of managerial status.[3] What the Court of Appeals did not, however, dispel is the fact that it was the court itself which weighed the evidence in deciding that Provost's non-supervisory employee status precluded a determination that he was a manager. It simply cannot be denied that this decision, on an issue never addressed by the NLRB, was made in the first and sole instance by the Court of Appeals.

This Court has long held that the judiciary cannot make an initial determination upon an issue entrusted

[3]The court below appears to indicate that the indicias of managerial and supervisory authority are so intertwined as to make a determination on one decisive of the other. Thus, the court stated "When the fact-finder clearly determines a substance to be minimal, it necessarily follows without additional statement that it is not animal or vegetable." (Memorandum Opinion, Appendix B, *infra*, p. 68). The court's reasoning simply does not comport with the law. See, *NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 277, wherein this Court speaks of the related but *narrower category* of supervisory employees as opposed to managerial employees.

See also, *NLRB v. International Typographical Union*, 452 F.2d 976, 979 (10th Cir., 1971), wherein the court remanded the case to the NLRB for a determination of managerial status even though the NLRB had already found that the employee was not a supervisor. Thus, a determination of an employee's supervisory capacity in no way decides whether that employee falls within the distinct and more encompassing category of a manager.

by legislative enactment to an administrative agency.[4] Thus, in the landmark decision delineating the scope of judicial review of administrative decision-making, *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943), the Court stated:

> "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

This Court has reaffirmed the prohibition on the substitution of judicial discretion for agency decision-making in the very recent case of *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers,* ..... U.S. ....., 48 L.Ed.2d 382, 92 LRRM 2507 (1976), wherein the Court, in granting a petition for certiorari, vacated a determination of the United States Court of Appeals for the District of Columbia Circuit because that court decided in the first instance an issue within the particularized expertise of the National Labor Relations Board. In so doing, this Court stated (48 L.Ed.2d at 387, citation omitted):

[4]The decision of managerial status, as well as other exclusions from the definition of an employee in Section 2(3) of the Act is clearly one within the expertise and primacy of the National Labor Relations Board. See, *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 130-132 (1944).

> "Whether or not the Court of Appeals was correct in this reasoning, we think that for it to take upon itself the initial determination of this issue was 'incompatible with the orderly function of the process of judicial review'."

There simply can be no basis for distinguishing the action of the Court of Appeals vacated by this Court in *South Prairie Construction Co. v. Local No. 627, supra,* from the action taken by the court below in the instant case. The limited scope of review applicable in judicial consideration of agency action was far exceeded by the Court of Appeals in its refusal to require that the agency address issues presented to it and in its usurpation of agency functions in deciding those issues in the first instance. Enforcement of the limitations on the scope of judicial review is mandated in this case no less than in the case of *South Prairie Construction Co. v. Local Union No. 627, supra.* The administrative process will serve its designated purpose of providing a specialized and alternative decision-making forum only if the agency is told by reviewing courts that it must fulfill its statutory assignment in fully addressing and deciding those issues presented to its administrative competence. As the Court stated in *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 169 (1962):

> "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate, the administrative process . . ."

The action of the Court of Appeals in usurping administrative decision-making is in direct conflict with relevant decisions of this Court; decisions newly affirmed in *South Prairie Construction Co. v. Local No. 627, supra.* A writ of certiorari lies to correct a decision of a court of appeals on a federal question which is in conflict with applicable decisions of this Court.

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2. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDING WITH THE DISFAVORED CONSEQUENCES OF UNDERCUTTING ADMININSTRATIVE PROCEDURE AND ENCOURAGING INCREASED LITIGATION IN FEDERAL COURTS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A separate and independent ground exists for the granting of the instant petition for writ of certiorari; the necessity of the judiciary insuring agency compliance with fundamental standards of administrative decision-making. The enforcement of standards will both strengthen the integrity of the administrative process and lessen the necessity of federal court intervention in the administrative system.

The National Labor Relations Board failed to comply with established standards of decision-making in one major respect. The agency blatantly refused to make a decision on Mr. Provost's managerial status or to articulate a basis for its lack of a decision. Any decision regarding Mr. Provost's employee status was necessarily dependent upon a well-reasoned and sup-

ported conclusion that Mr. Provost was neither a supervisor nor a managerial employee. The first conclusion of non-supervisorial status is documented, explained and set forth in the NLRB's decision; the second conclusion is non-existent. No statement is offered by the NLRB to the effect that Mr. Provost did not exercise managerial authority; no justification nor explication appears with reference to the managerial question.

The NLRB thus ignored a basic tenet of administrative review. It failed to make findings, to articulate or to clarify the bases for its actions. This failure to disclose reasons for its decision, if indeed any was made, invalidates the actions; any other conclusion would constitute an approval of administrative capriciousness. It is a governing precept of administrative decision-making that an agency justify its actions by setting forth findings and conclusions with supporting explanation and evidentiary documentation demonstrating the reasons for its orders. *Phelps Dodge Corporation v. NLRB,* 313 U.S. 177, 197 (1941); *Securities and Exchange Commission v. Chenery Corporation, supra,* 318 U.S. at 94-95; *Burlington Truck Lines, Inc. v. United States, supra,* 371 U.S. at 168; *NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 443 (1965); *FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 248-259 (1972).

A court may not uphold agency action on a basis not utilized nor formulated by the agency itself; moreover, the court has a further obligation of remanding any outstanding issues to the agency in order

to insure performance of its delegated functions. This is precisely what was not done by the Court of Appeals for the Ninth Circuit in the instant case. The court in effect compounded the agency's errors by substituting its judgment for that of the administrative body; an impermissible substitution wholly outside the scope of the Court of Appeals' authority.

The action of the court below has impact far beyond the consequences in the immediate case with the effect of allowing the NLRB to breach its duty to decide issues placed before it. If the NLRB no longer has an obligation, because of the Court of Appeals' refusal to enforce that obligation, to address issues properly raised before it, then those issues will be forever retained for litigation *de novo* in the federal appellate court.

The clearly foreseeable consequences of the Court of Appeals' actions in the instant case are an increase in needless litigation before the federal courts; needless in the sense that such issues can and should be finally and completely decided by the administrative body. The judiciary's function is to review the actions actually taken by the administrative body upon a narrowly-circumscribed standard of review. This Court long ago recognized the effect of unreasoned and undisclosed agency action on the workload of the federal courts; an effect which has special meaning given the current concerns with the workload of the federal judiciary. Thus, this Court has stated:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress

> has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders . . . it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis for its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board." *Phelps Dodge Corp. v. NLRB, supra,* 313 U.S. at 197.

Thus, this writ of certiorari raises the sole issue of the Court of Appeals' refusal to require that the NLRB meet fundamental standards inherent in the administrative process; a refusal implicit in its decision not to remand this case to the NLRB for consideration of News Director Provost's managerial status. The importance of this case is not whether Director Provost was discriminatorily discharged nor whether Mark T. Provost was a managerial employee; the issue here raised involves the orderly and principled functioning of the adminstrative process.

The Court of Appeals charged with enforcing agency adherence to standards of decision-making failed to require that those standards be met; the court, in fact, further denegrated the administrative process by deciding the issue of managerial status itself. If the NLRB is permitted to act with impunity in deciding only those issues which it chooses

to decide, and in ignoring determinative issues in any given case, then every case before the National Labor Relations Board will automatically become a case for a federal court of appeals. The administrative process itself will exhibit neither validity nor finality.

The Court of Appeals has taken a dangerous step in making itself an avenue of recourse in substitution for the National Labor Relations Board; that step can only result in increased litigation before the court and a general weakening of both the NLRB's function and the court's position in the administrative scheme. Surely, this is the precise result which both the United States Congress and this Court have continuously sought to avoid in both initially establishing administrative bodies and in clearly and repeatedly delineating the sphere of authority accorded those bodies and the courts charged with reviewing administrative action.

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
GARRY G. MATHIASON,
MAUREEN E. MCCLAIN,
LITTLER, MENDELSON, FASTIFF & TICHY,
Attorneys for Petitioner.

August 12, 1976.

(Appendices Follow)

APPENDICES

Appendix A

215 NLRB No. 116

United States of America
Before The National Labor Relations Board

Cases 20-CA-8724 and
20-CA-8839

Pacific FM, Inc., d/b/a Radio Station K-101
and
American Federation of Television and Radio Artists, San Francisco Local Branch of Associated Actors and Artists of America, AFL-CIO

DECISION AND ORDER

On June 12, 1974, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the Administrative Law Judge's decision. Respondent also filed a motion to reopen the hearing and the General Counsel filed a motion in opposition to Respondent's motion.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Na-

tional Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, the motions, and briefs,[2] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[1]Respondent's motion seeks to reopen the hearing to present what is alleged to be previously unavailable evidence bearing on the supervisory status of alleged discriminatee Mark T. Provost. In support of its motion, Respondent asserts that the proffered exhibits were unavailable during the hearing because they were placed in files which were mislabeled and that it was only subsequent to the hearing that said exhibits were discovered in the mislabeled files. We consider it unnecessary to pass on the relevancy of the documents submitted because we do not agree with Respondent's contention that it has presented sufficient basis to support its assertion that the exhibits were previously unavailable in the sense that it would warrant reopening the hearing to receive such exhibits in accord with Sec. 102.48(d)(1) of the Board's Rules and Regulations. These exhibits that Respondent now contends were previously unavailable are the type which we regard as normal business records. As such, they were at all times at its disposal. Except for the allegation that these exhibits were placed in a file which was mislabeled, the Respondent has not made any other showing to establish the unavailability of the evidence contained in the exhibits. Our examination of these exhibits clearly shows that they were in existence during the course of the hearing and the only claim offered to establish their alleged unavailability is one brought about by Respondent's own negligence. We are of the opinion that a party should be held responsible for any consequences flowing from its negligent acts. Further we are of the opinion that the reasons asserted by Respondent to establish the unavailability of the exhibits do not fall within the category of special circumstances which would warrant reopening the hearing for the receipt of the exhibits. For these reasons, we shall deny Respondent's motion to reopen hearing.

[2]The Respondent's motion requesting oral argument is denied, as the record, including the exceptions and briefs, adequately presents the issues and positions of the parties.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Pacific FM, Inc., d/b/a Radio Station K-101, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C., Dec. 13, 1974

Edward B. Miller, Chairman
John H. Fanning, Member
Howard Jenkins, Jr. Member
National Labor Relations Board

(Seal)

JD-(SF)-98-74
San Francisco, Calif.

United States of America
Before The National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Cases Nos. 20-CA-8724
20-CA-8839

Pacific FM, Inc., d/b/a Radio Station K-101

and

American Federation of Television and Radio Artists, San Francisco Local Branch of Associated Actors and Artists of America, AFL-CIO

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San Francisco, Calif., for the
Respondent.

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SUBJECT INDEX

DECISION

Statement of the Case

RICHARD D. TAPLITZ, Administrative Law Judge: This case was tried at San Francisco, California, on February 20, 21, 25, 26 and 27, 1974. The charge in Case No. 20-CA-8724 was filed on November 7, 1973, by American Federation of Television and Radio Artists, San Francisco Local Branch of Associated Actors and Artists of America, AFL-CIO, herein called AFTRA or the Union. The charge in Case No. 20-CA-8839 was filed on December 19, 1973, by the Union. Complaints which issued on December 19, 1973, in Case No. 20-CA-8724 and on January 25, 1974, in Case No. 20-CA-8839 were consolidated on January 25, 1974, by order of the Regional Director for Region 20 of the Board. The consolidated complaint alleges that Pacific FM, Inc., d/b/a Radio Station K-101, herein called Respondent, violated Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended.

Issues

The primary issues are:

1. Whether Respondent, through its agents, violated Section 8(a)(1) of the Act by threatening employees with loss of employment for engaging in union activities, by interrogating an employee with regard to union sympathies, by telling employees that it would not agree to any union proposal if the Union were selected as the employees' representative, and by threatening to withhold severance pay from an

employee if that employee filed an unfair labor practice charge with the Board.

2. (a) Whether Respondent discharged Mark Provost on October 1, 1973, because Provost engaged in union activities, and

(b) Whether Provost was a supervisor within the meaning of the Act.

3. Whether Respondent discharged employee Harry Young on December 13, 1973, because he engaged in union activities.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Well-written and extremely comprehensive briefs were filed on behalf of the General Counsel and Respondent. They have been carefully considered.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent, a California corporation, is engaged in the operation of a commercial radio broadcasting station at 700 Montgomery Street, San Francisco, California. During the year immediately preceding issuance of complaint, Respondent received gross revenues in excess of $100,000, purchased goods and services valued in excess of $10,000 directly from suppliers located outside of California, and was a subscriber to United Press International Wire Service, an interstate news service. The complaint alleges, the answer admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer as amended admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Allegations that Respondent Violated* Section 8(a)(1) of the Act

1. Background

Respondent operates a radio station. It is composed of three departments, which are: sales, programming and news. The programming department is responsible for the scheduling and presentation of music, and contains about five disc jockeys. The news department complies and presents news reports. For most of the time relevant here, the news department has consisted of two full-time and one part-time on-the-air newsmen and one reporter who generally has no on-the-air duties. Mark Provost was one of the on-the-air newsmen. He also held the title of news director. He was discharged on October 1, 1973. Harry Young was one of the disc jockeys. He was discharged on December 13, 1973. The complaint alleges that these discharges were causally related to the Union activities of Provost and Young.

On September 12, 1973, Provost approached Don Tayer, the president of the Union, and discussed the possibility of starting an organizational campaign at the station. Tayer told Provost about the mechanics of getting the campaign started. Provost returned to the Union office the following Saturday, September 15, and obtained blank authorization cards from Tayer. He solicited employees at the station to sign the cards on September 15 and 16, and returned signed cards to the Union on Monday, September 17, 1973. A number of employees, including Young, signed the cards. The Union then filed a petition for an election. A copy of the petition was received by Respondent the following day, September 18, 1973.

2. The meeting of September 18, 1973

a. *Facts*

Gabbert received a copy of the election petition on the morning of September 18, 1973. He immediately checked some information about unions given him by the National Association of Broadcasters. At 1:15 p.m. that day, he had the news and disc jockey personnel meet with him in his office.[1] Five witnesses testified as to what occurred at this meeting. They were Provost, Gabbert, news reporter Jessica Cafferata, disc jockey Richard Wiseman (also known as Rich Sherwood) and Program Director Don Kelly (also known as Larry Snyder).

[1]Gabbert testified that he had previously talked to Program Director Don Kelly concerning the holding of a meeting to explain company policies to new employees. However, the timing of the meeting with regard to the petition, as well as the fact that Gabbert admittedly opened the meeting by referring to the petition, indicates that the meeting was called at this particular time because of the filing of the petition. Meetings were not a common occurrence, the last one having occurred in 1972.

Provost testified as follows: Gabbert opened the meeting by telling them that he had received the petition for an election that had been filed with the Board. He said that he had spoken to his attorney who had advised him not to make any promises or threats. Gabbert said that a union in the station would bankrupt him at that time and that he could not possibly afford to have an organized AFTRA unit at the station. He reminded them that he was not making any new promise by telling them they would receive AFTRA scale the day he was able to obtain an AM station that he had been seeking. He then spoke about the possible consequences of a successful union vote, telling them that one of the things he had looked into was an automation system which interested him greatly; that there would be a possibility of cutting way back on the number of "on-the-air" employees if he were to go to automation; that if he were put in a financial bind because of having to pay higher salaries by a successful union election, he would go back to a previous operating practice of having disc jockeys read news so that he could get rid of the news room; and that such a procedure would wipe out three salaries. He concluded by saying that things like that were beginning to take the fun out of broadcasting for him and that he might turn his license back to

the government or close down the whole thing. During the speech, he spoke of his financial and cash flow difficulties. Gabbert also spoke to Provost and said that Respondent would not have any trouble keeping Kelly and Provost out of the bargaining unit as supervisors or management, and that they could keep the station operating with supervisory personnel, if there was a strike.

Gabbert's testimony concerning what he said at the meeting was substantially different. He acknowledged that he opened the meeting by saying, "Well, we have received this petition from the National Labor Relations Board and some of the employees here would like to be represented by a union." He averred that he made that comment in a light, passing way just to break the ice, because the last staff meeting was with different employees in 1972. Gabbert testified that he gave a long explanation to the staff concerning the problems of an independent radio station and his financial difficulties, and he reminded them of a prior promise to raise the pay scale when the AM station was acquired. He testified that he told the staff: that if he were in business to make money, he would have automated the station, but he could never do that; that if anything happened to force a sudden increase in costs, such as the blowing up of an antenna, higher salaries, or an earthquake, they would be in serious trouble and as the news department was the least necessary part of the operation in terms of finances, it could be cut; and that he could sell the station for $2,000,000 and retire on

the interest, but he wouldn't do that.[2] Gabbert testified that he did not link the employees voting for a union with reduction in staff, automation or the closing of the station. He averred that after mentioning the union petition, he was sidetracked on the financial side of the radio station and never got back to the Union. Gabbert's testimony in this regard is subject to considerable doubt. His assertion that he mentioned the Union only to break the ice is particularly difficult to believe. He acknowledged that immediately after mentioning the Union petition, he said, "We should talk about this". Later in his testimony, he acknowledged that he could have said, "We should talk about this because it could have an effect on either salaries or job security." In the light of subsequent statements made by Gabbert which are discussed below, the timing of the meeting, and the remarks admittedly made by Gabbert, it is clear that he took the union matter very seriously. I do not believe Gabbert's assertion that he mentioned the petition to break the ice, got sidetracked in financial matters and never go back to the Union. His testimony in this regard convinces me that he is less than a fully candid witness.

Cafferata testified that Gabbert spoke of financial difficulties and said that he might have to cut back in the news department because of financial problems.

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[2]Gabbert corroborated Provost's testimony to the effect that as the meeting was breaking up, Gabbert told Kelly and Provost that this matter did not affect them, as they were supervisors, and if there were a strike at the station, they had enough supervisory personnel to operate.

She also averred that he said he would not automate and that she didn't remember anything being said about closing the station or a raise. In addition, Cafferata averred that Gabbert did not say that if the Union came in he would reduce the staff, automate or close. Cafferata also tesified that she did not recall Gabbert saying anything at the meeting about the Union or a petition. All the other witnesses who testified about this meeting, including Gabbert, recalled that the meeting was opened with a reference by Gabbert to the Union's petition. Cafferata's testimony in this regard indicates that either she had a very poor recollection of the meeting or that her candor left something to be desired. In either case, little reliance can be placed on her testimony.

Wiseman tesified that Gabbert told the staff: that a petition for an election had been filed to see if the employees wanted AFTRA; that the station was in financial trouble; that if there was an increase in costs he would have to let some employees go and that might be in the news department; and that he could automate or sell but he didn't want to do that. Wiseman also testified that Gabbert may have talked about past promises of wage increases, but that he did not recall it, and that he did not recall Gabbert saying anything about it not being as much fun to operate the station as it used to be. Wiseman averred that Gabbert did not say that if a labor organization was selected he would cut the news department, automate or sell. However, he did acknowledge that Gabbert opened the meeting by saying, "I have just received this petition signed by the station employees that a union vote is going to be taken", and that he then discussed financial difficulties and thereafter referred to dire possibilities with regard to employment. In determining whether Gabbert tied in the union issue with the remainder of his speech, the testimony and affidavit of Don Kelly is instructive.

Kelly is an admitted supervisor. He hires and fires employees.[3] He testified: that Gabbert told the staff that he received information from the Board that there was going to be a vote; that Gabbert made the remark to break the tension; that Gabbert laughed it off and went on with the meeting; and that Gabbert spoke of financial difficulties and past promises to raise pay scales to that of other San Francisco stations when the AM station was acquired. Kelly also averred that Gabbert told them that if overhead went up without an increase in income that there would have to be a reduction in staff, and that it would be in the news department. He testified that Gabbert said he could sell or automate, but he wouldn't. According to the testimony of Kelly, Gabbert did not say that if the employees voted for the Union that he would automate, sell, reduce the staff or cut the news department. Kelly averred that Gabbert did talk about the enjoyment going out of broadcasting for him, but that the remark related to Gabbert's buying out his partners and the problems with the new station and had no connection with the

[3]The complaints allege the answer admits and I find that Kelly and Gabbert are supervisors and agents of Respondent within the meaning of the Act.

Union. Kelly testified that: "The only time (Gabbert) said anything about the Union was at the beginning as kind of a little joke to break the tension; but never in the body of the meeting was there ever any reference to the Union". However, Kelly's credibility is completely shattered by the inconsistencies in an affidavit that he gave to the General Counsel. In that affidavit, Kelly swore:

> Gabbert, as I recall, told the employees, that if a union was brought into the station and that higher wages were made effective, because of financial considerations the staffing of the station may have to be reduced. I do not recall that Gabbert said if the union was brought into the station, that he may close the station. I do recall Gabbert did say, something to the effect. If the union was brought into the station it would take the enjoyment of his job because he felt he could deal better with individuals rather than an outside organization. He also said, "if I was in the business of making money, I could sell the station for $2 million and live off the interest." He also mentioned automation in the context that if he was only interested in the monetary value he could automate the station and live off the profits.

Kelly's attempts to reconcile his testimony with the affidavit were totally unconvincing. The affidavit not only corroborates the essence of Provost's testimony but is independent evidence of what happened at the meeting in that it is an admission against interest by an agent of Respondent.[4]

[4]C.f. *Hribar Trucking, Inc.*, 143 NLRB 327, modified in part 337 F.2d 414 (C.A. 4, 1964).

In sum, I credit the testimony of Provost regarding the events of that meeting. That evidence is corroborated in substantial part by Kelly's admissions in his affidavit. I do not credit Kelly's testimony that is inconsistent with that affidavit. In a like manner, I do not credit Gabbert or Cafferata's testimony where it is inconsistent with Provost's, and I do not credit Wiseman's testimony concerning his interpretation of Gabbert's remarks where that differs from the testimony of Provost. I find that, at this meeting, Gabbert told the staff about the Union's petition, told them of his financial difficulties, told them that he couldn't afford a union and told them that the possible consequences of their selection of the Union would be automation or elimination of the jobs in the newsroom. In addition, I find that Gabbert told them that things like unionization took the fun out of broadcasting for him and he might turn in his license to the government and close down the operation.

b. *Conclusions as to the September 18 meeting*

Under Section 8(c) of the Act, an employer is free to convey his opinions concerning unionization to his employees. Though an employer may state what he reasonably believes will be the likely economic consequences of unionization that are outside his control, this freedom does not extend to threats of economic reprisal to be taken solely on his own volition. As the United States Supreme Court held in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1967):

> (An employer's prediction about the consequences of unionization) must be carefully phrased on the

> basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . in the case of unionization . . . . If there is any implication that an employer may . . . take action solely on his own initiative for reasons unrelated to economic necessity and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion.

An employer's bare assertion that a union's contract demands might compel the elimination of certain jobs can violate Section 8(a)(1) of the Act where there is no showing that the employer knew what demands the union might make in connection with the negotiation of a contract. *Helfrich Vending, Inc.*, 209 NLRB No. 99.

In the instant case Gabbert, in his speech, coupled unionization with increased costs and a resultant reduction in newsroom jobs. The objective nature of Gabbert's speculation in this regard is put in question by Gabbert's statement at the meeting that wages were going to be increased when the expected acquisition of the AM station materialized. It is further put in doubt by Gabbert's statement to Harry Young in mid-October 1973, described in detail below, in which Gabbert told Young that he was the only announcer then employed who would benefit from the Union, because the others were getting above union scale already. When Gabbert's remarks concerning unionization, the financial difficulties of the station, and the possible reduction of jobs in the newsroom

are combined with his statement to the employees that things such as unionization were beginning to take the fun out of broadcasting for him and he might hand in his license and close down the station, it is clear that Gabbert was not making predictions based on probable consequences beyond his control, but was threatening action on his own initiative. I therefore find that Respondent, through Gabbert, violated Section 8(a)(1) of the Act by threatening employees with loss of employment if they selected the Union to represent them.

3. Gabbert's alleged remarks to Young concerning the futility of bargaining—facts and conclusions

In October 1973, Young was a disc jockey for Respondent on the midnight to 6 a.m. shift. He was paid $750 a month.

On October 11, 1973, Gabbert approached Young at the station and told him that he liked the performance of Mike Webb, the relief man who had filled in for Young while Young was on vacation, better than he liked Young's performance. Gabbert said that if it wasn't for the fact that the Union had filed a petition with NLRB, Young would not be working there. Gabbert said that he could not fire Young for another two weeks and referred to a hearing in Provost's case that was originally scheduled to take place in two weeks. Gabbert complained about Young's work and suggested a parting of the ways. Gabbert told Young that Provost did a stupid thing in bringing the case,

because they had proved that he was a supervisor. Shortly thereafter, Young went into the control room and Gabbert followed him. Gabbert said that he didn't see how the announcers would vote for the Union, because they were already getting above union scale and that the only ones who would benefit from the Union would be Young and Hirschfeld (who was no longer at the station). Gabbert said the Union would "screw you", that he had had experiences with them, and he found they did not help at all. Gabbert then told Young that he didn't see how the Union could get the necessary five out of eight votes but that if they did, he would say no to any proposal the Union brought him. Gabbert also said that the employees could go out on strike but the station would continue to function and that he would automate if he had to.[5]

When employees select a union to represent them in a Board-conducted election, the employer has a duty to bargain with that union in a good-faith effort to reach an agreement. Where, as here, an employer tells an employee that even if the employees select the Union, he will say no to any proposal that the Union

[5]These findings are based upon the testimony of Young. Gabbert acknowledged speaking to Young on October 11, but he averred that in the conversation he told Young that he was thinking of shutting down the midnight to 6 a.m. shift because so few people listened. He averred that he also told him that he (Young) did a fairly good job putting music together, but that as a loose announcer, he was not going to make it because he always read the same thing at the same time. Gabbert averred that he told Young that Young was not going anywhere and suggested that he look for a job elsewhere. Gabbert denied that there was any comment about a NLRB petition or about the Union. As indicated above, I was not impressed with Gabbert's candor. On the other hand, I believe Young to be a fully credible witness. I therefore credit Young where his testimony conflicted with Gabbert's.

brings before him, he is telling the employee, in effect, that he will not bargain in good faith and that it would be futile for the employees to select the Union. A decision on the part of an employer to reject any proposal that a union will make is totally inconsistent with any concept of good-faith bargaining. In substance, Gabbert was telling Young that he (Gabbert) would violate the Act by refusing to bargain if the employees selected the Union to represent them. Where an employer impresses the futility of union activity on employees in such a manner, he interferes with their right under the Act to engage in such activity and therefore violates Section 8(a)(1) of the Act. C.f. *Smith Company of California, Inc.*, 200 NLRB No. 106. I therefore find that Respondent, through Gabbert, violated Section 8(a)(1) of the Act by telling Young that if the Union were selected by the employees, Respondent would say no to any proposal that the Union brought before it.

4. The severance pay issue—facts and conclusions

Young was discharged by Kelly on Thursday, December 13, 1973. On that day Kelly told Young that Gabbert was scheduled to go to Hawaii for two weeks, but to come back the following day for his paycheck, severance check, license and letter of recommendation. Young returned on Friday, December 14, at which time Kelly gave him his license, paycheck and a letter of recommendation, but told him to return the following Monday for his severance check. He did return on Monday, December 17, and Kelly told him that

Gabbert was in Hawaii for two weeks and could not sign checks. Kelly said that Gabbert wanted him to find out what Young would do regarding his discharge before giving him his severance check. Kelly asked whether Young would be bringing a charge against the station about his discharge. Kelly said that both Hirschfeld and Provost had received severance checks and then turned around and brought charges against the station. In addition, Kelly said that the filing of charges wouldn't help Young because he would be screwing himself. Kelly also said that even though there was no black list, as such, word gets around, and if Young filed charges it would be hard to get a job in the market. Kelly then said that if anyone asked him about this conversation, he would disavow any knowledge of it. Kelly told Young that they were not going to give him the severance check until they found out what he was going to do concerning filing a charge. Kelly concluded by saying that Gabbert would rather use his severance pay for attorney's fees if he was going to bring charge against the station.[6]

Young filed a charge with the Board on December 19, 1973 and on January 9, 1974 he received a check from Respondent for the severance pay.

[6]The above findings are based on the testimony of Young. Kelly testified that the reason that he did not give the severance paycheck to Young on Friday, December 14 was that he had been unable to obtain Gabbert's signature while Gabbert was preparing to leave for vacation. He denied that he told Young anything about the severance check being held up to see whether a charge was going to be filed. I credit Young and discredit Kelly.

The credited evidence establishes that on December 17, 1973, Respondent, through Kelly, threatened to withhold Young's severance pay if Young filed an unfair labor practice charge with the Board.[7]

In order for the Act to be effectively administered, channels of communication from aggrieved persons to the Board must remain open. Young had a right under the Act to file a charge with the Board. Kelly interfered with Young's access to the Board's processes by threatening to withhold severance pay if Young filed a charge. Kelly was a supervisor and an agent of Respondent. I find that Respondent, through Kelly, violated Section 8(a)(1) of the Act by threatening to withhold severance pay from Young if he filed a charge. C.f. *John C. Mandel Security Bureau Inc.*, 202 NLRB No. 25.

5. The interrogation—facts and conclusions

William N. Groody was hired as an "on-the-air" newsman on September 19, 1973 to fill in for Provost who had gone to Florida because of his father's illness. On September 21, in Gabbert's office, Gabbert asked Groody whether he would like Provost's job. Groody asked whether it would be as news director, and Gabbert replied that it would not. Gabbert said they were having some problems with Provost in that direction and he would just as soon not have a news

[7]Respondent's brief argues that the delay in the payment of severance pay was caused by Gabbert's Hawaiian vacation. The complaint does not allege the delay as an unfair labor practice but only alleges the threat to withhold payment as a violation of the Act. As found above, the threat was made.

director at that time.[8] Gabbert told Groody that Provost had left without contacting him, and that was the straw that broke the camel's back, so Provost would not be working there when he returned. Gabbert also mentioned the philosophical rift that had developed between them. Gabbert told Groody that he would have Provost's job as soon as Provost was fired. During this conversation, Gabbert asked Groody: "How do you feel about labor unions?" Groody answered that he was a member of AFTRA and Gabbert replied, "Oh".[9]

In *Big Three Industries, Inc.*, 192 NLRB 370, the Board adopted the Administrative Law Judge's decision which held:

> In determining whether interrogation concerning union activities violates Section 8(a)(1) of the Act, the Board has held that all the circumstances in which the interrogation occurs must be considered. *Blue Flash Express, Inc.*, 109 NLRB 591. In that case, the Board dismissed a complaint where such interrogation was accompanied by a statement from the company as to a legitimate reason for the interrogation, where the company representative assured the employee against reprisals, and where the company had not demonstrated union hostility. See also *N.L.R.B. v.*

[8]As of the date of the trial, no one held the title of "News Director".

[9]These findings are based on the testimony of Groody and Gabbert. Gabbert testified that he did not complete the question and that he intended to ask whether the fact that there was going to be an election would affect Groody's desire to work at the station. I do not credit Gabbert's assertion in this regard.
It is not clear from the record when, during the course of the conversation, Gabbert asked about unions.

Camco, Inc., 340 F.2d 803 (C.A. 5), where such matters as the place of the interrogation and the rank of the official doing the questioning were also considered. Though in *Struksnes Construction Co., Inc.*, 165 NLRB 1062, the Board was concerned with a polling of employees rather than individual interrogation, some of the language in that case is instructive. The Board held: "In our view any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on the Section 7 rights. As we have pointed out, 'An employer cannot discriminate against union adherents without first determining who they are.' *Cannon Electric Company*, 151 NLRB 1465, 1468. That such employee fear is not without foundation is demonstrated by the innumerable cases in which the prelude to discrimination was the employer's inquiries as to the union sympathies of his employees." The Board went on to hold that in a polling situation a violation would be found unless the purpose of the poll was to determine the truth of a union's claim of majority; this purpose was communicated to the employees; assurances against reprisal were given; the employees were polled by secret ballot; and the employer had not engaged in unfair labor practices or otherwise created a coercive atmosphere.

In *Struksnes* the Board revised the *Blue Flash* criteria to conform to this new standard.

In the instant case Gabbert, the owner and highest ranking official of Respondent interrogated Groody

concerning his union sympathies. The interrogation took place in Gabbert's office in the course of an interview which led to a change in Groody's status from a part-time to a full-time employee. The interrogation cannot be considered isolated in that it occurred only three days after Gabbert had unlawfully threatened dire consequences if the employees selected the Union to represent them. The interrogation was part of a pattern of intimidation and was followed by Gabbert's unlawful threat to Young to the effect that union representation would be futile and by Kelly's unlawful threat to Young that severance pay would not be paid if he filed a charge. I find that Gabbert's interrogation of Groody concerning Groody's union sympathies was coercive and violative of Section 8(a)(1) of the Act.

3. *The Discharge of Mark Provost*

1. The reason for the discharge

a. *Respondent's contention with regard to the conflict in philosophy and the unauthorized leave of absence*

Provost was discharged on October 1, 1973. Respondent takes the position in its brief that Provost "was discharged for a difference in news philosophy triggered by a self-granted emergency leave."

Prior to August 1972, the station was receiving low ratings, and as a result Gabbert decided to play softer music and change the approach to newscasting. From Gabbert's point of view, he wanted to make the newscasts more entertaining in the sense of personalizing the news, making it pertinent to the listener and making the listener feel that the newscaster was speaking to him on a one-to-one basis. In August 1972, Gabbert told his news staff that he wanted that approach. According to the credited testimony of Provost, Gabbert told them that he wanted more opinions on newscasts in order to attract attention, and the reporters were to become more deeply involved in one side or the other of a story and to let that interest show in the newscast. Provost expressed his disagreement with Gabbert's philosophy and spoke in favor of a classic journalistic style with the key being dissemination of information in such a way as to allow the listener to make up his own mind. However, in spite of his stated opposition to the change, Provost become convinced in part that news was entertainment and should be used as a promotional device for the station to attract the attention of listeners. He started moving in that direction. Gabbert acknowledged in his testimony that Provost made an attempt to implement the philosophical changes that Gabbert required. According to Gabbert, Provost tried hard, but the execution never came off the way Gabbert wanted it. Gabbert spoke to Provost about their differing philosophical approaches to broadcasting on a number of occasions. Four or five times since the begining of 1973, Gabbert gave Provost instructions to change particular aspects of his broadcast. Provost credibly testified that on some of the occasions he expressed his personal view to Gabbert, but that he always followed Gabbert's directions. The issue of

broadcasting philosophy was raised by Gabbert in a meeting that occurred between September 3 and 8, 1973, in which Gabbert blamed the news department with dragging the station down.

At about 1 p.m. on September 19, 1973, Provost called Program Director Kelly and told him that his (Provost's) father was seriously ill with a heart condition, and that he might have to go to Florida on short notice if the situation deteriorated. Kelly replied that he was sorry to hear it, and he hoped that Provost's father did not get any worse. They spoke about getting a replacement to cover Provost. The following morning Provost saw Kelly at the studio and they discussed who might be available to cover Provost if necessary. Bill Groody's name was mentioned. Groody was an applicant at the time for the part-time news announcer's position that was to open because of the resignation of Bruce Jensen. In midafternoon that day, Provost received a call from his mother, saying that his father was in an intensive care unit and his presence was needed. He called the station and spoke to Tom Nelson, who was on duty at the time. He told Nelson that he had to leave town and to be sure to tell Kelly. Provost gave Nelson an address and number in Florida and said that his wife could be contacted at their local address if he could not be reached. That evening, Provost called Kelly and told him that his father's condition had worsened and he had to go to Florida. Provost said that he had spoken to Nelson and Nelson was ready to break in Groody, the weekend man, to cover his shift. Kelly said, "Thanks for letting me know. I am glad the situation

is taken care of."[10] Provost left for Florida on September 20 and returned from Florida on October 1, 1973, the day he was discharged. On October 26, while he was in Florida, he called the station and told Nelson that his father's condition had stabilized and that he would be back on October 1. Provost asked Nelson how things were going in the newsroom, and if there were any problems created by his absence. Nelson replied that everything was very smooth and quiet and that Provost should take his time.

b. *The terminal interview*

Provost returned from Florida on October 1, and worked the 5 a.m. to 1 p.m. shift that day. At 1:15 p.m. he was called into Gabbert's office. Gabbert handed him an envelope with 2 weeks pay and told him that he was terminated. Provost asked for an explanation and Gabbert replied, "As you know I am in a life and death struggle with the union. I have to line up my ducks and knock them over. You, because of your title as News Director, are fireable right now, and actually although there are some other people on the staff that I would like to get rid of, the National Labor Relations Board's rules won't allow me to terminate anybody else. But I can fire you." Gabbert also told Provost that although they had some arguments on news philosophy in the past, he (Gabbert) did not consider those reasons by themselves enough to terminate him, and that if the union

[10]These findings are based on the testimony of Provost as supplemented in part by the testimony of Kelly.

issue had not come up, he would not be terminating him at that time. Provost said that it was a rotten thing to do to him when his father was in the hospital and he had heavy medical bills, and Gabbert responded that it was a gray world, and he just couldn't help it. They discussed Provost's abilities as a newscaster, and Gabbert said that Provost would be good in an all news station but that he was not fitting in at that time with what Gabbert wanted to do. At some point in this conversation, Gabbert said that he knew who had signed applications for the Union because he had a contact with the Board. Provost replied that he did not believe Gabbert could get that information from the Board. A few minutes later, Gabbert said that he thought Provost might have signed one of the cards, and that Provost might be very favorable to the Union. At the end of the conversation, Gabbert said that he realized Provost could go to the NLRB about the discharge, but that Provost would be better off if he took the firing gracefully. Gabbert also said that if Provost did go to the Board and file a complaint, he (Gabbert) would make it impossible for Provost to work as a newsman anywhere else in the Bay Area. Provost replied that he didn't believe Gabbert's influence extended that far, and Gabbert said, "perhaps I cannot close the market completely for you, but I can make it darn difficult for you to find any other job."

The above findings are based on the credited testimony of Provost. Gabbert testified to a very different version of the conversation. According to Gabbert, he

told Provost they were pushing in opposite directions, that they were not on the same wave length anymore, and that they didn't understand each other. He denied that he said anything about Provost's union activities, about getting ducks in a line, about names on authorization cards or about filing a charge with the Board. As indicated above, I believe that Provost was a more credible witness than Gabbert, and I credit Provost's testimony concerning the conversation.

Respondent argues strenuously in its brief that Gabbert should be credited over Provost in this regard. Respondent points out the circumstances of Groody's hiring to support its position. As is set forth in detail above, Groody was hired as a part-time employee on September 19, 1973 and was told by Gabbert on September 21 that he was to replace Provost as soon as Provost was fired. During that conversation on September 21 Gabbert interrogated Groody concerning his union sympathies and Groody told Gabbert that he was a member of the Union. Even though Gabbert knew of Groody's union membership, he still replaced Provost with Groody. Respondent argues in effect, if Gabbert were motivated by anti-union considerations it would have made no sense for him to discharge Provost for union activity and hire a union member, Groody, as a replacement. Based on this logic, Respondent urges that Provost's version of the terminal interview should be discredited.

Respondent's attempt to use its own unfair labor practice (the interrogation) as a shield to defend

against other unfair labor practices is not convincing. Though Gabbert did not impress me as a candid witness, he did convince me that he is very astute and quick minded. Gabbert could not lawfully refuse to hire an employee because that employee was a union member. Gabbert may well have reasoned that if he refused to give the job to Groody after he interrogated Groody concerning union sympathies and ascertained that Groody was a union member, he would be in a very difficult position to defend himself. Gabbert had just 3 days before made dire threats to his staff concerning unionization and a petition for an election was pending with the Board. On the other hand, Gabbert felt reasonably safe in discharging Provost. If Provost was a supervisor, such a discharge would not be violative of the Act. Gabbert thought he could establish that Provost was a supervisor. He said as much to Provost and Kelly at the conclusion of the September 18 meeting. In like manner, he told Young on October 11, 1973 that Provost had done a stupid thing by bringing the NLRB case because they had proved that Provost was a supervisor.

Provost was the key activist for the Union. That activity was carried out between September 12 and 17, 1973. On September 18, Respondent through Gabbert attempted to undermine the Union by engaging in the violations of Section 8(a)(1) set forth above. Two days later Provost left for Florida because of his father's medical emergency. On October 1, when Provost returned Gabbert told Provost that he suspected that Provost was active on behalf of the Union, that if

the union issue had not come up he would not terminate him at that time, and that because Provost was news director, he could be fired. In light of those findings, Respondent's defense that Provost was discharged because of a difference in philosophy and because of an unexcused absence cannot be given credence. It is also noted that the philosophical difference had been going on since August 1972. During all that time, Respondent could live with it. The situation changed only after the union activity. The unexcused absence defense also lacks substance. Kelly was an admitted supervisor. Provost notified him of the need for emergency leave and arrangements were made to cover him. Kelly raised no objection to the procedure. I find that both the philosophical and absence defense were raised as pretexts.[11]

In sum, I find that Provost was discharged on October 1, 1973, because of his activities on behalf of the Union.

2. Provost's status as a supervisor or employee

a. *Background*

Provost was hired by Respondent in 1969 as an on-the-air newscaster. His duties required him to pre-

[11]Gabbert testified that in April 1973 he spoke to Jensen with the thought in mind of having Jensen take Provost's job. He also testified that on September 11, 1973, he had an hour interview with Groody with the thought of offering him Provost's job. In neither case did Gabbert say anything to the applicant about Provost's job and apparently Gabbert was describing only his thought processes. Respondent argues that the fact that Gabbert did not ordinarily interview prospective employees for part-time jobs indicates that the hour he spent with Groody was keyed to Provost's full-time slot. I do not credit Gabbert with regard to his description on his thought processes.

pare newscasts from wire service reports, newspapers and other sources, and to present the report on the air. On May 1, 1970 Provost was given the title of news director. During most of the time thereafter, the news department consisted of two full-time on-the-air reporters (including Provost), a part-time on-the-air weekend reporter and a full-time "street" reporter who had no on-the-air duties. After he was given the news director title, Provost continued to assemble and deliver newscasts. The news director title did not carry with it any wage increase, nor was he given an office, a specially designated place to work, or a budget for the news department. Though Provost did assume some additional duties, which are discussed in detail below, Gabbert did not delineate Provost's duties as news director.[12]

When Provost was discharged on October 1, 1973, he was earning $1,050 a month.[13] Groody, who replaced Provost on October 1, 1973, is paid $1150 a month,

[12]Gabbert testified that when he appointed Provost news director, he told Provost that it was up to Provost to keep the news department running smoothly, to expand the department in terms of news coverage and to follow the general format and philosophy of the station. He averred that he told Provost that he (Gabbert) did not like to be bothered with day-to-day operations, like vacation schedules or sick leave, and that he only wanted to be consulted in important matters. According to Gabbert, he told Provost that it was Provost's news department as long as he kept within the format and philosophy of the station. Provost, in his testimony, denied the substance of Gabbert's assertion in this regard. I credit Provost and do not credit Gabbert.

[13]Provost was hired at $800 a month and received a number of raises to bring him to $1,050 a month. In the spring of 1972, Provost asked for a $100 a month raise. Gabbert agreed and said that he was very happy with Provost's work and that he wished he could afford to give more than the $100.

even though he did not assume Provost's title as news director. Thomas Nelson, the other full-time, on-the-air news reporter presently working for Respondent, is paid $1175 per month ($275 a week). Kelly, who is admittedly a supervisor and who Respondent contends was a parallel authority to Provost, is paid $1625 a month ($375 a week).[14] Thus, Provost, who was the news director and, according to the Respondent, a supervisor, was paid less than the two employee newscasters who are currently employed. In addition, his pay was substantially less than Program Director Kelly, whose equal, according to Respondent, Provost was supposed to be.

b. *Provost's role in hiring*

After Provost became news director, he handled applications for employment in the news department. When an inquiry was received and no opening was available, Provost routinely answered the inquiry with a letter stating that there were no jobs at the time but that the inquiry would be kept on file. When an opening was anticipated, the general practice was for Provost to read the resumes and interview the available applicants. In addition, Provost assisted in the cutting of an audition tape on which the applicant made a sample news broadcast. On occasions, Provost screened out applicants. Of the 50 tapes he assisted

[14]Respondent contends that the amounts paid to on-the-air personnel in the broadcasting industry are keyed in large measure to the individual's broadcasting personality and his value to the station. While that may well be so, the relative pay of employees and supervisors is still one factor to be considered in evaluating their relationship.

in cutting during his tenure as news director, he submitted about 45 to Gabbert for decision. He would normally fold the resume on the tape reels and leave them on Gabbert's desk. Sometimes he selected two or three of the tapes that he considered best and put them on the top of the pile. On some occasions, he wrote a memo to Gabbert stating who he thought was best. At times, he submitted between 10 and 15 tapes to Gabbert.[15]

Respondent on occasions used the services of "stringers", who were independent reporters who sell stories to various media. The practice is for the stringers to call the station and speak to the newsman who is on duty. Each newscaster can accept or reject the story. The station pays $5 per story. Provost, as well as the other newsmen, accepted stories from stringers. As news director, Provost checked the stringer billings, but this was also sometimes done by Robert Hirschfeld, a reporter.[16]

While Provost was news director, Respondent hired eight full or part-time employees in the news department. They were White, Jorgensen, Hirschfeld, Plumb, Nelson, Cafferata, Jensen and Groody. The record does not indicate whether Provost played any part in the hire of Plumb, a part-time newscaster. As to all the others, there is evidence of Provost's role.

[15]These findings are based on the testimony of Provost. Gabbert testified that Provost screened out tapes and generally gave him three or four with a strong recommendation for the one he felt best and that he never submitted 15 tapes. I credit Provost.

[16]This finding is based on the credited testimony of Provost. I do not credit Gabbert's assertion that Provost handled the contracting of the stringers.

Provost did not take any part in the interview of two of the employees, White and Cafferata. White was hired in June of 1970 just a month after Provost was made news director, and was interviewed by William Keffury, who was program director at the time. Cafferata had applied for a job in the news department some time before her hire and was told by Provost that there were no openings then available. Later, she applied for a job as a disc jockey to Kelly. Kelly told Provost that Gabbert was interested in Cafferata as a news reporter and asked him to check with her prior employers.[17] After Provost made the inquiry, Kelly asked him what he thought about her background and Provost answered that everything was negative and he didn't think she should be hired. Some time in August 1973, Cafferata spoke to Gabbert and on August 31, 1973, she was hired as a full-time street reporter. Thus, as to White, Provost played no part in his hire, and as to Cafferata, Provost's negative recommendation was ignored.

For some time before Hirschfeld's hire as a news reporter on October 15, 1970, he had been a stringer who sold stories to Respondent and other news media. Before Hirschfeld's hire, Provost, who was Hirschfeld's friend, repeatedly urged Gabbert to hire Hirschfeld. Everyone at the station knew of Hirschfeld's work. Provost told Gabbert that Respondent was already paying Hirschfeld a substantial amount for his work as a stringer and that making him a staff mem-

[17]Kelly testified that he did not instruct Provost to have a background check on Cafferata. I credit Provost's testimony to the contrary.

ber would help the station and not be overly costly. At first Gabbert told Provost that he would like to hire Hirschfeld but that they didn't have the money. Finally, on October 15, 1970, Gabbert who had been in touch with Hirschfeld in connection with a certain news story, hired Hirschfeld.[18] There were no other applicants for the position given to Hirschfeld, as the job was newly created for him.

Jensen had three separate periods of employment with Respondent and after each, he left voluntarily. The third period began in 1972 when Provost was news director. Provost called Jensen and asked whether he would be available for part-time work. Jensen replied that he would be interested and Provost said that he would see what he could do, even though Gabbert didn't like people leaving and coming back. At that time, Gabbert had already rejected other applicants for a part-time opening that existed. Provost recommended that Jensen be hired and told Gabbert that Jensen would do a good job. Gabbert said he would think it over. Thereafter, Gabbert authorized Jensen's hiring.[19]

Before Nelson was hired in 1972, Provost had forwarded a tape of another applicant to Gabbert and

[18]Gabbert testified that Provost told him that it was his (Provost's) decision as news director that Hirschfeld be hired and that Gabbert should trust his judgment. Gabbert also averred that he told Provost that it was Provost's department, and that Provost made the final decision to hire Hirschfeld. I do not credit Gabbert's assertions and I do credit Provost's testimony to the contrary.

[19]Gabbert testified that he left the decision on waiving company policy against rehiring employees up to Provost and that Provost told him that he (Provost) had rehired Jensen. I do not credit Gabbert and I do credit Provost's testimony to the contrary.

told Gabbert that he was impressed with that other applicant. Gabbert rejected the application. Thereafter, Provost interviewed Nelson and suggested to Gabbert that Nelson be hired.

Provost interviewed Jorgensen for a part-time position in November 1971. Provost spoke to Gabbert about full-time employment for Jorgensen, but Gabbert said that he wasn't interested. Jorgensen was hired as a part-time employee. He also filled in for White for a time when White was ill.

Groody was hired on September 19, 1973 to fill in for Provost, who was going to Florida. Groody was told by Gabbert on September 21 that he would replace Provost when Provost was discharged. In August 1973, Groody called Provost and asked about a job. About 3 weeks later, Provost called back and said there was an opening for a part-time employee if he was interested. Groody wanted the job and an interview with Provost was arranged. Thereafter, Provost interviewed Groody and submitted a tape to Gabbert, together with the tapes of some other applicants. Provost did not send in a recommendation with the tapes but he had told Kelly that Groody was a friend of his and that he thought Groody would do as good a job as any of the other applicants.[20]

Gabbert did not like Groody's tape and a second tape was cut. Following the second cutting, Groody was interviewed by Gabbert on September 11.

[20]I do not credit Kelly's testimony that Provost asked him to listen to Groody's tape and told him that Groody was the man that he (Provost) was going to hire.

c. *Provost's role in discharges*

Two employees, Hirschfeld and White, were discharged during Provost's tenure as news director.

Hirschfeld was discharged on August 31, 1973. Gabbert made the decision to discharge Hirschfeld. He spoke to Provost about it and Provost argued strenuously that Hirschfeld was a good reporter and should stay. Nonetheless, Hirschfeld was fired.

Jack White was discharged on December 3, 1971. He was notified of his discharge by Provost, who told him that Gabbert wanted him fired immediately. Prior to that time, Gabbert had given him a reprimand. Before the discharge, Gabbert complained about White's performance to Provost and said that they were going to have to get rid of White. Provost told Gabbert that he agreed. Gabbert told Mary Alliston, the bookkeeper, that he was going to fire White and asked her to make out a final paycheck and two-weeks severance pay.[21]

Thus, it appears that with regard to the two discharges that occurred while Provost was news director, one discharge (Hirschfeld) took place over the objection of Provost and the other, (White) which Provost did not disagree with, was occasioned by Gabbert's dissatisfaction with the employee.

[21]Gabbert testified that in November of 1971 Provost told him that White was a bad newsman and was not a desirable person to have there. Gabbert averred that he left the decision up to Provost and that he said he had no objection if Provost got rid of White. He further testified that the next thing he heard about the matter was when the bookkeeper asked him to sign a check for the termination and severance pay for White. According to Gabbert, he asked the bookkeeper whether White was leaving them, and she replied in the affirmative. Mary Alliston, the bookkeeper testified that it was Gabbert who told her that he was going to fire White and asked her to make out the checks.

Alliston no longer works for Respondent. She left with ill feeling toward Respondent over a pay matter. In evaluating her testimony, I have considered the possibility of bias. Nonetheless, I credit her version of the conversation and discredit Gabbert's.

d. *Provost's other duties*

Provost did not direct the work of the employees in the newsroom. Each morning the newsmen conferred (with the afternoon newsman calling in) and compared notes concerning what stories were to be covered that day. Provost did not give the other newsmen assignments or tell them what stories to cover, although he did give suggestions in the course of the discussions.[22]

[22]These findings are based on the credited testimony of Provost, which was corroborated by a number of other witnesses. White testified that they mutually agreed on what stories were to be covered and made suggestions to each other. Jensen testified that Provost did not give him orders. Hirschfeld testified that Provost never gave him orders to cover a story, that newsroom people got together and decided what to do, and that they always worked out the problems between themselves. Jorgensen testified that Provost never told him to cover a specific story and that he used his journalistic background to decide what stories to cover. Cafferata testified to the contrary. She averred that between the time that she reported for work on August 31 and the time Provost left on September 20, 1973, that Provost told her what stories he wanted her to cover and told her how to rewrite stories. She also testified that from the time Provost left she decided herself what she will cover and she does not need directions. As indicated above, I do not believe that Cafferata was always an accurate witness. Whatever guidance Provost gave her can be explained in terms of an experienced worker helping a less experienced one, rather than a supervisor directing an employee. Nelson testified that after June 5, 1973, Provost did not assign any work to him and that to the best of his recollection, there was no situation that developed after that date in which direction was needed. There is an implication that prior to that date, Provost did assign him work. In the light of the credible testimony of the other witnesses mentioned above, I do not credit Nelson in this regard.

In March of 1973, President Nixon gave a speech without much notice to the media. There was some question as to whether it should be carried on the station, and Nelson, who was on duty at the time, called Provost concerning the matter. Provost said that it was his opinion that the speech should not be carried in the light of Gabbert's prior policies. In the past, Gabbert had directed certain speeches not to be carried on the theory that people who wanted to watch them would be seeing them on television. Provost asked Nelson to talk to Kelly about it. The speech was not carried, and Gabbert was upset. The following day Provost said that he would take responsibility, and he tried to justify his position to Gabbert.

On June 5, 1973, Provost complained to Gabbert that Nelson wasn't doing his share of the work. Gabbert interrupted him and said that it was none of Provost's concern, that Provost was responsible for his own on-the-air performance, and that Provost was taking the title too seriously and was off on a power-trip. Gabbert told Provost that Provost was responsible only for his own performance and that he should relax and let the other people do what they were doing.[23]

[23]This finding is based on the credited testimony of Provost. Gabbert testified that Provost approached him and told him that he would resign if Nelson was not fired. Gabbert averred that when he asked why, Provost told him that Nelson wasn't working enough and wouldn't listen to him. Gabbert testified that he then told Provost that Nelson was following the philosophy he (Gabbert) wanted and he suggested that Provost not force him into making a decision. Gabbert acknowledged in his testimony that he told Provost that Provost was abusing his power as a news director and was harassing Nelson. Gabbert also averred that he told Provost to get off Nelson's back. I do not credit Gabbert's assertions where they conflict with Provost's.

Sometime after June 5, 1973, Hirschfeld overheard Gabbert telling Nelson that Provost was taking the title of News Director too seriously, and that Gabbert said "Why can't Mark get it through his head that he is news director in name only."[24]

Respondent had a vacation policy of granting employees two-week vacations for the first three years of employment and then three weeks. When Provost first became news director, anyone wanting vacations contacted Gabbert or the program director informally to obtain clearance. In order to avoid confusion and questions, Provost began to write down vacation information, both for himself and for the other newsmen and to submit it to Gabbert. Provost had no authority to change the amount of vacation time or to deny vacations. He never told any employee that

[24]This finding is based on the credited testimony of Hirschfeld. Both Gabbert and Nelson denied that this conversation took place. I do not credit them. As indicated above, I do not believe that Gabbert was always a candid witness. I was also unimpressed with Nelson's credibility. On several occasions his evidence was in conflict with an affidavit that he gave to the General Counsel. His attempts to explain the discrepancies were not convincing. In his testimony he averred that he did not meet Gabbert until after he was hired, yet, in his affidavit he averred that at some time during the interview stage, he was introduced to Gabbert. In his testimony, he averred that Provost scheduled vacation times and that on one occasion when he requested time off, Provost told him that another employee already had that time. In his affidavit he averred that Provost did not deny vacation time and that the newsmen would cover for each other when any of them had to take off. The affidavit states that Provost did not actually grant time off, yet, further in his testimony he averred that on August 24, 1973 Provost did grant him vacation time.

that employee could not take a requested vacation and he did not resolve conflicts in vacation requests.[25]

Respondent points to certain miscellaneous correspondence undertaken by Provost as an indication of supervisory authority.[26] Most are letters to job applicants stating that there were no jobs available. In addition, Provost wrote a number of memos to Respondent regarding vacation requests. There is correspondence from Provost to the bookkeeping department concerning stringer billings. There is a proposal concerning newsroom design. In addition, there is an unsigned draft of a memo from Provost relating efforts to hire minority employees in which the assertion is made that Provost seriously considered a certain applicant for employment.

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[25]These findings are based on the credited testimony of Provost. Hirschfeld averred that on one occasion, when his father-in-law died, he asked if he could leave and Provost told him to go ahead. Nelson, in a similar vein testified that on one occasion, when his father had a stroke, he asked for some vacation time, and Provost told him to go ahead and that he would take care of everything. In these circumstances, however, Provost's remarks can be explained in terms of a co-employee volunteering to cover during an emergency rather than a formal granting of time off by a supervisor. Nelson also testified that he requested Thanksgiving off in 1972 and that Provost told him that Jensen had already applied for that time, and therefore, he could not have it. In the light of an inconsistent statement in an affidavit that Nelson gave to the General Counsel, I do not credit him. In that affidavit, Nelson averred that the newsmen covered for each other when they had to take time off, that Provost did not actually grant time off, and that they arranged those matters among themselves. Jensen credibly testified that he asked Provost for time off. He explained that he asked Provost if Provost would change with him so that he (Jensen) would work Saturday and Provost would work Sunday.

[26]It is noted that Hirschfeld also engaged in certain correspondence for Respondent.

In the light of all the testimony set forth above with regard to Provost's duties, I specifically discredit Gabbert's assertions that he considered the program director and the news director to be on an equal basis in the hierarchy of the station; that Provost had the responsibility to carry out programming policy with regard to news; that Provost set vacations within vacation policies established by Gabbert; that Provost had authority to approve or disapprove vacations and sick leave; that Provost assigned a daily calendar; that Provost handled the contracting of stringers; that Provost did all interviewing of applicants; and that Provost was responsible for the product that came out of the news department.

3. Analysis and conclusions with regard to Provost's discharge

As found above, Provost was discharged because of his activities on behalf of the Union. Under the Act, employees are protected against discharge for such a cause. Supervisors are not so protected. Provost's status as a supervisor or employee is therefore critical.

Section 2(11) of the Act defines "Supervisor" as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely

routine or clerical nature, but requires the use of independent judgment.

In determining whether a person is a supervisor, the Board looks to that person's actual duties, rather than to a title or to theoretical powers. As Court of Appeals for the Fourth Circuit said in *N.L.R.B. v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235 (C.A. 4, 1958):

> . . . the employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title. It is a question of fact in every case as to whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management.

The same theme was reiterated by the Fifth Circuit in *Ross Porta-Plant, Inc. v. N.L.R.B.*, 404 F.2d 1180 (C.A. 4, 1968) where that Court held:

> In enacting Sec. 2(11) of the Act Congress did not intend to exclude from its protection any individuals except those who possess true managerial powers. This section is designed to apply to supervisors with genuine management prerogatives as distinguished from "straw bosses, leadmen, set-up men, and other minor supervisory employees." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 4. The company's designation of these employees as "department heads," "assistant foremen," or "foremen" is not controlling in the absence of delegation to them of bona fide managerial powers.

Where a person "effectively recommends" or "responsibly directs" within the meaning of the Act, he is a supervisor. However, where that person is no more than a leadman-type rank-and-file employee whose judgment is valued, sought and considered, he is not a supervisor. *Montgomery Ward & Co., Inc.*, 198 NLRB No. 9; *Orr Iron, Inc.*, 207 NLRB No. 133; *Cast-A-Stone Products Company*, 198 NLRB No. 66, enf. 479 F.2d 396 (C.A. 4, 1973).[27]

As the indicia of supervisory status contained in Section 2(11) of the Act are set forth disjunctively, it must be determined whether Provost met any of those indicia. *N.L.R.B. v. Budd Mfg. Co.*, 169 F.2d 571 (C.A. 6, 1948)

Provost spent the great bulk of his time preparing and presenting news reports for on-the-air broadcasts. When he was given the title news director, he was not told what new responsibilities, if any, he had. He was not given a wage increase, an office or a budget for the news department. His earnings were less than the pay given to the employee who replaced him, even though that employee did not assume any "news director" duties. Nelson, an employee who Provost allegedly supervised, earns more than Provost did at

[27]See also *The Rowand Company, Inc.*, 210 NLRB No. 14, where the Board relied on the fact that a person received the same pay and performed the same type of work as other laborers in finding him to be an employee rather than a supervisor.

the time of his discharge. Provost's earnings were substantially less than the persons who Respondent admits to be supervisors.

Provost did have a role in the hire of new employees, but it was extremely limited. There were eight persons employed during Provost's tenure as news director. There is no evidence in the record concerning what role he played, if any, in the hiring of Plumb. Provost did not even interview two of the new employees, White and Cafferata. Provost did interview Groody, who was Provost's replacement but it was Gabbert who gave the meaningful re-interview. Gabbert was familiar with Hirschfeld's work, as Hirschfeld had been a stringer. It was Gabbert who decided to hire Hirschfeld after a direct contact with him in a news story. In a similar vein, Gabbert was familiar with Jensen's work, as Jensen had worked for Respondent before Provost was hired. Provost did make recommendations but Gabbert gave them weight only when he was so inclined. Provost recommended strongly against the hiring of Cafferata, and she was hired. He objected vigorously to the discharge of Hirschfeld and he was fired. Provost agreed that White should be let go, but it was Gabbert who formulated the idea of discharging him and made the decision.

As found above, Provost did not direct the work of the employees in the newsroom. Although Provost relayed vacation information to Gabbert, he did not make decisions concerning vacations, nor did he resolve conflicts in vacation requests.

Provost carried on certain miscellaneous correspondence for Respondent, but that was of a routine nature and did not involve the type of independent discretion that would indicate a supervisory status.

On June 5, 1973, when Provost complained to Gabbert that Nelson wasn't doing his share of the work, Gabbert dispelled any illusions that Provost might have had concerning the meaning of the title "news director". Gabbert told Provost that he was taking the title too seriously and that he was off on a power trip. Gabbert also told him that he (Provost) was responsible only for his own performance and that he should relax and let the other people do what they were doing. Thereafter, Gabbert made a similar reference to the very employees that Provost allegedly supervised. Gabbert asked Nelson, in the presence of Hirschfeld why Provost couldn't get it through his head that he was news director in name only.

After weighing all of the above factors, I find that Provost was an employee and not a supervisor within the meaning of the Act. As an employee, Provost was protected by the Act when he undertook activities on behalf of the Union, and, therefore, I find that Respondent violated Sections 8(a)(3) and (1) of the Act by discharging him for those activities.

C. *The Discharge of Harry Young*

1. The General Counsel's case

Young worked for Respondent from August 1966 to December 13, 1973. He was originally hired as a part-time tracking engineer. In 1969, he was given a full-

time position as a disc jockey on the midnight to six a.m. shift. From that time until his discharge he selected music, played records on the air and performed the regular duties of a disc jockey announcer. When he became a disc jockey in 1969, there was no sponsor for his shift. In the late Spring or early Summer of 1971, Moulthrop Sales began to sponsor Young's program. That sponsorship continued until July 4, 1973. From that date, until Young's discharge on December 13, 1973, the program was unsponsored.

Young signed a union authorization card on September 16, 1973. During the three or four years between his becoming a disc jockey and his signing of a union card, he received a number of compliments about his work from officials of Respondent.[28] On several occasions Gabbert told Young that Young programmed the best music on the station. In the beginning of 1973, Kelly sent Young a memo stating: "You sound great, keep up the good work." In February 1973, a Mr. Grubb, who is a representative for sponsor Moulthrop Sales, shook Young's hand and said that Young was doing a great job. Young was hired as a disc jockey at $500 a month. He received

[28]Kelly credibly testified that Young asked him for a change in shift and that he (Kelly) told Young that he didn't feel Young could handle the day shift. Kelly also testified that on several occasions when Young asked about the change in shift, he (Kelly) told Young that if Young was unhappy and couldn't see the light at the end of the tunnel, he should see about another job. Young's testimony was less detailed, but was in substantial accord. Although Respondent did refuse to honor Young's request for a transfer to a daytime shift and did suggest that he resign if he weren't happy about it, it does not follow that Respondent had any complaint concerning the midnight to six a.m. shift which Young did work.

three or four raises, the last of which was in February or March of 1972, which brought his pay to $750 a month.

Gabbert received the petition for an election on September 18, 1973, two days after Young signed an authorization card. As set forth in detail above, Gabbert responded to the petition on the same day that he received it by threatening employees with loss of employment if they selected the Union to represent them. On October 1, 1973, Gabbert discharged Provost because of his union activity. On October 11, 1973, Gabbert attempted again to undermine the Union by telling Young that he would say "no" to any proposal that the Union brought him. In that conversation Gabbert told Young, in substance, that he didn't believe that announcers getting more than union scale would vote for the Union and that the only ones that would benefit from the Union would be Young and Hirschfeld (who had already been discharged). Gabbert's remark about the voting and the benefit of unionization to Young establish that Gabbert suspected that Young was sympathetic towards the Union. During this conversation, Gabbert told Young that he liked the performance of Mike Webb, the relief man who had filled in for Young while Young was on vacation, better than he liked Young's performance, and, that if it weren't for the fact that the Union had filed a petition, Young would not be working there. Gabbert also told Young that he didn't like Young's on-the-air voice, that Young's approach wasn't what they were looking for and that the best thing for both of them would be a parting of the ways.

Up to the time of the union activity, Gabbert had expressed nothing but praise for Young. Within a month after Young had signed a union authorization card, Gabbert indicated that he was suspicious that Young was sympathetic toward the Union and spoke of discharging him. Gabbert's hostility toward Young continued.

On October 14, 1973, Kelly called Young at home and said that he knew Gabbert had talked to Young about the possibility of replacing him with Webb, but that as far as he knew, everything was as usual, and Young should come in and do his shift.

On November 15, Assistant Operations Manager Kasper wrote a memo to Young reminding Young that they hadn't had a sponser since July 3. Kasper went on to say that because of the energy crisis, they might shorten the broadcast hours. The memo stated: "Should the decision to eliminate some broadcast hours be made it would have a direct effect on your position with K-101."

On November 27, 1973, Gabbert wrote a memo to Young stating:

> In the past two weeks your programming of music has hardened up quite a bit. The music is contrary to what you have been instructed to do by Don Kelly. The music is supposed to flow and be contemporary, but never hard or driving. Your current programming will only lead to rapid drops in audience as it is not in keeping with the format of the station. Remedial action has to be taken by you immediately. A word of caution: It has to be properly balanced and not end up too draggy.

On December 13, Kelly discharged Young and unlawfully told him that Respondent was not going to give him severance pay until they found out whether he would file a charge.

2. Respondent's defense

Respondent alleges that Young was discharged because: a new sponsor, Undulator Water Beds, had been found for the midnight to six a.m. shift; Kelly did not believe that Young could announce in the impromptu and improvised manner that was desired; and the ratings on Young's show had been low.

Respondent introduced survey ratings which indicated that the ratings for August-September, 1973 were among the lowest of the Bay Area stations. There is no indication that this rating was different than it had been in the past or that prior to the date of discharge anyone complained to Young about his ratings.

On December 10, 1973, Kasper wrote to Kelly saying that they had a sponsor for the midnight to six a.m. shift. In the memo he said that he had doubts about Young's ability to pull off the ad-lib bit successfully and that he felt the loss of the prior sponsor was due to Young's lack of competence.[29]

On December 12, 1973, Kelly wrote a note to Young telling him that the all-night show had been sold to

[29]Gabbert testified that in February of 1973, Grubb, a salesman for Moulthrop Sales told him that he was dissatisfied with the show because it was too impersonal. Young credibly testified that about the same time Grubb was complimenting him on his performance. Assuming that Gabbert's testimony is true and that Grubb did complain to him, it appears that Gabbert did not take it seriously enough even to talk to Young about it.

a new advertiser. The memo asked Young to see Kelly and Kasper the following day. The following day, Kelly told Young that he (Kelly) felt that Young could not do the commercials for the new sponsor and that he was discharged. In that conversation Kelly also mentioned Young's low ratings. Prior to that time Young was not aware of them. Kelly said he thought the prior sponsor left because of Young. Young was replaced by Steve Fisher who had been a part-time tracking engineer for the station.

Respondent argues that one of the reasons for Young's discharge was that Young could not ad lib successfully. However, he had not been asked to ad lib in the past. The promotional commercials for the new sponsor had been taped by a different disc jockey and Young had not been given any opportunity to try out for them.

3. Conclusions

General Counsel has established by a preponderance of the credible evidence that: Respondent had expressed satisfaction with Young's work for three or four years before the union activity; that Young engaged in protected union activity; that Respondent suspected that Young had engaged in that activity; that Respondent harbored a virulent animosity against the Union which was manifested by many unlawful acts, including a threat to discharge employees and the discharge of Provost; that after the union activity, Respondent began to express criticism of Young's work; and that the campaign against Young

culminated in his discharge, in the context of a threat by Respondent to withhold severance pay if Young filed a charge with the Board.

In view of these findings, Respondent's defense is unconvincing. On October 11, 1973, Gabbert told Young that he would be fired at that time if it were not for the pendency of the petition. This conversation occurred well before a new sponsor had been secured for the midnight to six a.m. shift. I find that Respondent's contention that Young did not meet the requirements of the new sponsor was merely raised as a convenient pretext to disguise the real motivation for the discharge. The same applies to Respondent's contention that the low ratings and Young's alleged inability to ad lib were reasons for the discharge. I find that after Respondent began suspecting Young's union sympathies, it began setting up pretexts for getting rid of him. Thus, on November 15th, Kasper attempted to ease Young out by sending him a memo which indicated that part of his shift might be cut out. In a similar vein, on November 27, Gabbert wrote to Young complaining about Young's selection of music, while in the past, Gabbert had nothing but compliments toward Young in that regard. When a new sponsor was finally secured, Respondent felt that it could safely get rid of Young, and he was discharged.

In sum, I find that the reasons put forward by Respondent for the discharge of Young were pretextural and that Young was discharged because of his activity on behalf of the Union. I further find that by that

discharge Respondent violated Sections 8(a)(3) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate and substantial relation to trade traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged Mark T. Provost and Harry Young in violation of Sections 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer them reinstatement[30] and make them whole for any loss of pay resulting from their discharge, by payment to each of them of a sum of money equal to the amount each normally

[30]The usual Board Order provides that a discriminatee is to be reinstated to his former job or, if that job no longer exists, to a substantially equivalent position. At the time of the hearing the "news director" job no longer existed. However, but for Respondent's unlawful conduct Provost would have continued in his job of "news director". I therefore recommend that Respondent be ordered to offer Provost reinstatement as "news director".

would have earned as wages from the date of his discharge to the date on which reinstatement is offered, less net earnings during that period. Such backpay shall be completed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company,* 90 NLRB 289, and shall include interest at 6 percent as provided in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

It is further recommended that Respondent be ordered to preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Mark T. Provost and Harry Young because of their activities on behalf of the Union, Respondent violated Section 8(a)(3) of the Act.

4. By the foregoing conduct, by threatening employees with loss of employment if they selected the Union to represent them, by telling an employee that if the Union were selected by the employees it would say "no" to any proposal that the Union brought be-

fore it, by threatening to withhold severance pay from an employee if that employee filed a charge with the Board and by coercively interrogating an employee concerning his union sympathies, Respondent has interfered with, restrained and coerced employees in the exercise of their rights guaranteed to them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[31]

ORDER

Respondents, Pacific FM, Inc., d/b/a Radio Station K-101, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting the American Federation of Television and Radio Artists, San Francisco Local Branch of Associated Actors and Artists of America, AFL-CIO, or any other union.

[31]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Threatening employees with loss of employment if they select that Union to represent them.

(c) Telling employees that if the Union is selected by the employees, it will say "no" to any proposal that the Union brings before it.

(d) Threatening to withhold severance pay from employees if they file charges with the Board.

(e) Coercively interrogating employees concerning their union sympathies.

(f) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer Mark T. Provost and Harry Young immediate and full reinstatement to their former jobs, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Post at its San Francisco broadcasting station copies of the attached notice marked "Appendix."[32] Copies of the notice on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: June 12, 1974

/s/ Richard D. Taplitz

Richard D. Taplitz

Administrative Law Judge

[32]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix

NOTICE TO EMPLOYEES

Posted by

Order of the National Labor Relations Board

An Agency of the United States Government

Pursuant to the recommended Order of an Administration Law Judge of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

After a trial at which all sides had a chance to give evidence, an Administrative Law Judge of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice.

The Act gives all employees these rights:

To engage in self-organization;

To form, join or help unions;

To bargain collectively through a representative of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all these things except to the extent that membership in a union may be required pursuant to a lawful union-security clause.

WE WILL NOT do anything that interferes with, restrains or coerces employees with respect to these rights. More specifically,

WE WILL NOT discharge or otherwise discriminate against any employee for supporting American Fed-

eration of Television and Radio Artists, San Francisco Local Branch of Associated Actors and Artists of America, AFL-CIO, or any other union.

WE WILL NOT threaten employees with loss of employment if they select that Union to represent them.

WE WILL NOT tell employees that if the Union is selected by the employees, we will say "no" to any proposal that the Union brings before us.

WE WILL NOT threaten to withhold severance pay from employees if they file charges with the Board.

WE WILL NOT coercively interrogate employees concerning their union sympathies.

WE WILL offer full reinstatement to Mark T. Provost and Harry Young, with backpay plus 6 percent interest.

Pacific FM, Inc., d/b/a
Radio Station K-101
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Region 20, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102 —Telephone Number: (415) 556-6721

Appendix B

Do Not Publish

United States Court of Appeals
for the Ninth Circuit

No. 75-1856

National Labor Relations Board,
Petitioner,

vs.

Pacific FM, Inc., d/b/a Radio Station K-101,
Respondent.

[May 17, 1976]

On Application for Enforcement of an Order of National Labor Relations Board

MEMORANDUM

Before: DUNIWAY and KENNEDY, Circuit Judges and BOHANON,* District Judge.

The NLRB has applied to this court for enforcement of its order, finding that Pacific FM, Inc. violated §§8(a)(1) and 8(a)(3) of the National

*The Honorable Luther Bohanon, Senior United States District Judge for the Northern, Western and Eastern Districts of Oklahoma, sitting by designation.

Labor Relations Act, 29 USCA 158, by discharging two employees because of their activities on behalf of the Union and by engaging in various forms of threatening conduct directed toward other employees prior to a Union vote. Pacific FM resisted enforcement of the order on the grounds that the record as a whole does not support the Board's findings that Pacific FM violated the Act, as well as on procedural failings in the Board's determination.

As to the former ground, we have reviewed the entire record and find that there is substantial evidence upon which the Board could base its findings of violations. *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951). Much of the testimony given in the hearings was in conflict. The Administrative Law Judge did not credit the testimony of several witnesses who had made inconsistent statements, and of Gabbert, the principal officer of Pacific FM. There were cogent, convincing reasons given for crediting some and not other testimony, and on appeal we must accept the assessment of credibility. *NLRB v. Walton Mfg. Co.,* 369 U.S. 404 (1962); *Salinas Valley Broadcasting Corporation v. NLRB,* 334 F.2d 604, 610 (C.A. 9 1964). Having done so, there exists substantial evidence warranting the findings of the Board. This rationale especially applies as to the assessment of direct and indirect evidence which aggregated, indicated that one employee, Provost, was not a supervisor within the meaning of §2(11) of the Act. *NLRB v. Southern Bleachery & Print Works,* 257 F.2d 235 (C.A. 4 1958), *cert. denied,* 359 U.S. 911 (1959).

Pacific FM contended that the Board failed in two "procedural" regards, of which the first was in failing to consider and address the issue of whether Provost, even if not a supervisor, was a manager without the ambit of the Act, *see NLRB v. Bell Aerospace Co.,* 416 U.S. 267 (1974). The Board examined and rejected the respondent's objections which were directed to the "managerial employee" issue and the Administrative Law Judge's lack of a specific finding to the effect that Provost was not a manager. Having examined the record, we have determined that each finding critical to a determination of non-managerial status does in fact appear; all Provost's duties were determined to be of such a nature as to make him only an employee.[1] The failure to contrast an employee with a manager is not fatal to the findings when there is substantial evidence supporting the conclusion that Provost was an employee. When the

[1]The factors weighed by the Administrative Law Judge in determining whether Provost was an employee as opposed to supervisor included whether Provost actually shared the powers of management, whether he had genuine management prerogatives and whether he effectively recommended or responsibly directed activities. "Managerial employees" are said to be those who "formulate, determine and effectuate management policies" *Ford Motor Co.,* 66 NLRB 1317 (1946) by "expressing and making operative decisions of their employer." *Palace Laundry Dry Cleaning Corp.,* 75 NLRB 320 (1947). There is obviously a possibility of overlapping definitions as to "supervisor" and "manager," *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 277 (1974). However, it is also obvious that the nature of the employee's function is the critical factor in drawing any distinction. As both "supervisors" and managerial employees" are excluded from the Act's coverage, it is the analysis of the worker's function, regardless of any title or label applied by the employer or the Board, which must withstand scrutiny. The functional analysis in this case was supported by substantial evidence, and its scope was such as to eliminate the possibility of Provost being a managerial employee. Thus there is no need for a remand on this issue.

fact-finder clearly determines a substance to be mineral, it necessarily follows without additional statement that it is not animal or vegetable. The credited testimony and the Judge's findings were clearly antithetical to managerial status.

The second alleged error of the Board was in failing to reopen hearings to allow the introduction of three newly discovered exhibits. The Board examined the proffered exhibits and held that such recently found evidence had previously been unavailable due to the negligence of Pacific FM in keeping its normal business records. Additionally, the Board declared that there were no special circumstances which would warrant reopening. We are satisfied that the Board properly assessed the three exhibits offered after the hearings to the Administrative Law Judge and that there was no abuse of discretion in rejecting these as newly discovered evidence. *NLRB v. Yale Manufacturing Company*, 356 F.2d 69 (C.A. 1 1966); *see NLRB v. Southern Bleachery & Print Works, supra.*

Accordingly, the order is enforced.

Appendix C

STATUTES INVOLVED

Section 10(e) of the Labor-Management Relations Act, of 1947, as amended (29 U.S.C. §160(e)):

> "(e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of Title 28."

Section (2)(3) of the Labor-Management Relations Act of 1947 as amended (29 U.S.C. §152(3)):

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a

consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service or any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 8(a)(1) of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. §158(a)(1)):

"(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title:"

Section 7 of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. §157):

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor or-

ganization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 8(a)(3) of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. §158(a)(3)):

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

No. 76-227

In the Supreme Court of the United States

OCTOBER TERM, 1976

PACIFIC FM, INC., D/B/A RADIO STATION K-101,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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PACIFIC FM, INC., D/B/A RADIO STATION K-101,
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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The National Labor Relations Board found that during a union organizational campaign petitioner ("the Company") violated Section 8(a)(1) of the Labor Management Relations Act, 61 Stat. 140, 29 U.S.C. 158(a)(1), by threatening employees with loss of employment if they selected the Union to represent them. Specifically, the Company told an employee that if the Union were selected by the employees, it would say "no" to any proposal that the Union brought before it; threatened to withhold severance pay from an employee if that employee filed a charge with the Board; and coercively interrogated an employee concerning his union sympathies (Pet. App. 19-28, 59-60). The Board also found that the Company violated Section 8(a)(3), as amended, 29 U.S.C. 158(a)(3),

by discharging two employees because of their organizational activities on behalf of the Union (Pet. App. 28-35, 56-58, 59).

Before the Administrative Law Judge, the Company contended, *inter alia*, that one of the discharged employees, Mark Provost, was a supervisor within the meaning of the Act and therefore not subject to its protections. The Law Judge rejected the Company's contention and found that Provost was an employee under the Act[1] (Pet. App. 47-51).

Following the unfair labor practice hearing, but prior to issuance of the Law Judge's decision, this Court announced its decision in *National Labor Relations Board* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267. The Company's exceptions to the Law

[1]The Law Judge relied on the following facts: Provost, who was hired in 1969, was one of three on-the-air newsmen employed at the Company's San Francisco radio station. His duties required him to prepare newscasts from wire service reports, newspapers and other sources, and to present his reports on the air. On May 1, 1970, Provost was given the title of news director. His duties as news director, however, were not specified to him and he thereafter continued working his regular shift and performing his accustomed duties (Pet. App. 35-36). His salary continued at the same level; it was less than some other on-the-air broadcasters and significantly less than that of an admitted supervisor, whose equal the Company asserted Provost to be. Unlike the admitted supervisors, Provost did not have his own office or designated work space (Pet. App. 36-37). Provost processed applications for employment, but had no authority to hire or fire (Pet. App. 37-43). Provost did not give other newsmen assignments or direct their work (Pet. App. 43, 47). When Provost complained to Company President Gabbert that another newscaster was not doing his share of the work, Gabbert said it was none of Provost's concern (Pet. App. 44). On another occasion, Gabbert, in the presence of other newscasters, stated that Provost was taking his title of news director too seriously and said, "[w]hy can't Mark get it through his head that he is news director in name only" (Pet. App. 45).

Judge's decision, relying on that case, alleged, *inter alia*, that Provost was a managerial employee and therefore was not entitled to the Act's protections against discriminatory discharge.

In its decision and order, the Board stated that it had considered the record and the Law Judge's decision "in light of the exceptions, the motions, and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order" (Pet. App. 2).

The court of appeals in a memorandum decision upheld the Board's decision and enforced its order (Pet. App. 65-68). It specifically rejected the Company's assertion that the Board failed to consider its objection concerning Provost's alleged managerial status.

2. Petitioner's sole contention is that the Board improperly found Provost to be an employee without stating its reasons for rejecting the Company's belated contention[2] that he was a managerial employee.

The court of appeals' decision sustaining the Board's procedure and holding the Board's determination to be supported by substantial evidence on the record is correct and raises no issue warranting review by this Court. Contrary to petitioner's contention, the Board determined all relevant issues. As the court of appeals pointed out (Pet. App. 67-68):

[2]*Bell Aerospace, supra*, was decided after the parties' post-hearing briefs were submitted to the Law Judge, but *before* his decision issued. The Company never requested of either the Law Judge or the Board that the hearing be re-opened or the case remanded for the judge to consider the managerial status issue. Rather, it argued in its exceptions that the credited evidence, in the light of *Bell Aerospace*, warranted a finding that Provost was a managerial employee.

> The Board examined and rejected the respondent's objections which were directed to the "managerial employee" issue and the Administrative Law Judge's lack of a specific finding to the effect that Provost was not a manager. Having examined the record, we have determined that each finding critical to a determination of non-managerial status does in fact appear; all Provost's duties were determined to be of such a nature as to make him only an employee. The failure to contrast an employee with a manager is not fatal to the findings when there is substantial evidence supporting the conclusion that Provost was an employee. * * * The credited testimony and the Judge's findings were clearly antithetical to managerial status.

Thus there is no basis for petitioner's claim that the court of appeals encroached upon the Board's primary jurisdiction to determine the question of managerial status. Nor was the Board required to set forth a detailed ruling on each of petitioner's exceptions. As stated in *American President Lines, Ltd.* v. *National Labor Relations Board*, 340 F. 2d 490, 492, in which the Ninth Circuit rejected a similar contention:

> The order showed the ruling of the Board on the exceptions presented. The Board's order sufficiently informed petitioner of the disposition of all of its exceptions. We are unconvinced that petitioner suffered any prejudice because the Board did not make separate rulings on each exception and state the reasons for such rulings.[3]

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[3]Accord: *Borek Motor Sales, Inc.* v. *National Labor Relations Board*, 425 F. 2d 677, 681 (C.A. 7) (collecting cases), certiorari denied, 400 U.S. 823; *National Labor Relations Board* v. *Wichita Television Corp.*, 277 F. 2d 579, 585 (C.A. 10), certiorari denied, 364 U.S. 871.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

OCTOBER 1976.